

STATE OF MICHIGAN
COURT OF APPEALS

MELANIE SOKOLOWSKI,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

April 17, 2014

No. 307519

Wayne Circuit Court

LC No. 08-124738-NF

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff, Melanie Sokolowski, sought to recover benefits under Michigan's No-Fault Insurance Act¹ from defendant, State Farm Mutual Automobile Insurance Company (State Farm), for injuries that a school bus driver allegedly caused to her daughter, Skylar Sokolowski. Following a jury trial, the jury found that Skylar Sokolowski did not suffer an injury. Sokolowski appeals as of right the trial court's judgment in favor of State Farm. We affirm.

I. FACTS

A. BACKGROUND FACTS

Dr. James Chinarian testified that he began treating Sokolowski's daughter, Skylar Sokolowski, for a brain tumor in 2004. Skylar Sokolowski required brain surgery to remove the tumor and, during the surgery, she suffered a stroke. Dr. Kathleen Moltz, a pediatric endocrinologist who began treating Skylar Sokolowski in December 2004, testified that the removal of Skylar Sokolowski's brain tumor and her stroke combined to cause a variety of problems, including weakness on her left side.

Kevin O'Neill, Skylar Sokolowski's physical therapist, testified that Skylar Sokolowski had left-side weakness, but exhibited only mild differences in the strength of her left and right trunk muscles. O'Neill testified that, during Skylar Sokolowski's initial evaluation on May 2,

¹ MCL 500.3101 *et seq.*

2005, his assistant recorded increased kyphosis. Kyphosis is a spinal curvature problem in which the person's spine is folded forward. O'Neill testified that Skylar Sokolowski made progress in the first four or five months of physical therapy.

B. THE BUS INCIDENT

Sokolowski testified that, on August 30, 2005, the school bus returned Skylar Sokolowski home about eight minutes after it picked her up for school. Sokolowski testified that Skylar Sokolowski was crying and screaming that her back hurt. Sokolowski asked Skylar Sokolowski what happened, and she responded that "the bus driver was driving too fast."

David Meckl, a civil engineer, testified that the intersection, Hayes Road and 24 Mile Road, exceeded the standard grade change. Meckl testified that passing through the intersection at more than 30 miles an hour had caused the front of his truck to lift and the back end to "kick up." Meckl described the experience as "pretty violent."

C. SKYLAR SOKOLOWSKI'S PROGRESS FOLLOWING THE BUS INCIDENT

Dr. Edward Suchyta, Skylar Sokolowski's pediatrician, testified that Skylar Sokolowski came to his office on August 31, 2005, complaining of mid-back pain. Dr. Suchyta testified that Skylar Sokolowski appeared in "minimal distress," but identified a high intensity of pain "along the lower left costal margin." Dr. Suchyta ordered x-rays of Skylar Sokolowski's vertebrae. Dr. Suchyta testified that the radiologist reported a "[m]ild compression fracture of the back," for which he prescribed a back brace. Sokolowski testified that she consistently reported to Skylar Sokolowski's doctors that Skylar Sokolowski was experiencing back pain after August 30, 2005.

Dr. Michael Mendelow, an orthopedic surgeon, testified that he first saw Skylar Sokolowski on September 13, 2004. Dr. Mendelow testified that, after reviewing Skylar Sokolowski's x-rays, he saw no obvious or healing fracture in Skylar Sokolowski's spine, but he did see increased kyphosis. Dr. Mendelow opined that Skylar Sokolowski could have suffered a minimal bone fracture or could have received damage to her back muscles or connective tissue. Dr. Mendelow testified that he presumed that Skylar Sokolowski suffered a "T12 compression fracture" and prescribed a back brace.

Dr. Lynn Smitherman, Skylar Sokolowski's primary pediatrician, testified that Skylar Sokolowski came to an appointment in September 2005 and reported discomfort of the upper middle part of her back. Dr. Smitherman testified that Skylar Sokolowski reported ongoing back pain at an appointment in November 2005, but that she had not noted it in Skylar Sokolowski's patient history. Dr. Smitherman testified that she conducted a scoliosis study in 2005, which revealed "mild kyphosis and no significant scoliosis." Scoliosis is a spinal curvature problem in which the person's spine curves to the side.

O'Neill testified that, after August 30, 2005, Skylar Sokolowski wore a back brace to physical therapy and consistently reported localized back pain. O'Neill testified that he did not mention back pain in Skylar Sokolowski's physical therapy records because he was not obligated to document pain. However, O'Neill acknowledged that his physical therapy records noted Skylar Sokolowski's hip and leg pains.

Dr. Moltz testified that Skylar Sokolowski began experiencing adrenal crises in February 2006. Dr. Moltz explained that Skylar Sokolowski's pituitary gland was removed during her tumor surgery, which led to adrenal insufficiency—the inability to produce cortisol, which prevents stress caused by pain. Dr. Moltz testified that an adrenal crisis is a life-threatening episode during which the patient experiences “low blood pressure, which can dip down to shock levels, low blood sugars, changes in ability to fight off infection, and often unconscious states.”

Dr. Suchyta testified that there was no evidence of a spinal fracture or healing fracture on Skylar Sokolowski's x-rays from September 13, 2005, to July 11, 2008, and no evidence of a fracture on Skylar Sokolowski's November 2, 2006 bone scan. Dr. Suchyta testified that Skylar Sokolowski did not report any pain specific to her back during appointments in October 2005, November 2006, or May 2007, and she did not need any pain medication.

Dr. Chinarian's reports in May 2006 and June 2006 did not mention that Skylar Sokolowski had any pain. Dr. Chinarian testified that Skylar Sokolowski first began complaining of back pain in November 2006. Dr. Chinarian testified that, when he palpitated Skylar Sokolowski's back, the palpitation did not cause pain.

D. SKYLAR SOKOLOWSKI'S BACK SURGERY

Dr. Jeanne Lewandowski, a pediatrician and palliative care specialist, testified that she was part of Skylar Sokolowski's multidisciplinary team in the summer of 2007. Dr. Lewandowski testified that she diagnosed Skylar Sokolowski with chronic and severe musculoskeletal pain.

Dr. Richard Reynolds testified that, in June 2007, he performed a spinal fusion on Skylar Sokolowski to correct kyphoscoliosis—a combination of scoliosis and kyphosis—and pain associated with its progression. Sokolowski testified that, by August 2007, Skylar Sokolowski required 24-hour-a-day skilled care supervision.

E. SOKOLOWSKI'S COMPLAINT

On September 26, 2008, Sokolowski filed a complaint against State Farm, her no-fault insurer. In her complaint, Sokolowski asserted that Skylar Sokolowski's spine was injured when her school bus driver crossed an intersection at a high rate of speed, causing Skylar Sokolowski to bounce in her chair and fracture her vertebra. Sokolowski's complaint alleged that Skylar Sokolowski's fractured vertebra caused her subsequent medical problems, including her back surgery and adrenal crises.

F. TESTIMONY REGARDING SPINAL INJURY

At the trial, the parties disputed whether the August 30, 2005 bus incident injured Skylar Sokolowski's spine. Dr. Mendelow, Dr. Smitherman, Dr. Lewandowski, and Dr. Esalter each testified that they believed that Skylar Sokolowski was injured on August 30, 2005, and that this injury weakened the muscles supporting her spine. In contrast, Dr. Chinarian, Dr. Reynolds, Dr. Karol Zakalic, and Dr. Christopher Kazmierczak each testified that there was no evidence that Skylar Sokolowski was injured on August 30, 2005, and that her kyphoscoliosis was attributable to the different strengths of the neuromuscular structure on the sides of her spine after her stroke.

G. EVIDENTIARY RULING REGARDING DR. ASHTON-MILLER

Before trial, State Farm moved to preclude Dr. James Ashton-Miller from testifying about bus testing that he conducted at the intersection of Hayes Road and 24 Mile Road, the intersection at which Skylar Sokolowski was allegedly injured. The trial court initially precluded Dr. Ashton-Miller from testifying. However, the trial court granted Sokolowski's motion for reconsideration, ruling that

Dr. [Ashton-]Miller's testimony is not offered as accident reconstruction testimony in the traditional sense. His proposed testimony is demonstrative. He will explain the mechanism of Plaintiff's injury. This testimony can be considered along with the medical doctors['] testimony that the Plaintiff's injuries are related to the use of the motor vehicle. . . . In terms of speed, Dr. [Ashton-]Miller will testify that a micro fracture could occur if the vehicle was traveling at 35 MPH. The speed limit is 40 MPH. This Court will permit Plaintiff to lay the foundation regarding speed at the time of trial.

During the trial, State Farm challenged Dr. Ashton-Miller's testimony on the grounds that it was irrelevant because there was no evidence of the bus's speed. State Farm contended that Sokolowski had not noticed the bus driver as a witness, and it would be improper for the trial court to admit the bus driver's deposition testimony from a separate case. Sokolowski responded that the bus driver's deposition testimony was admissible. Sokolowski further contended that she could testify that the bus driver stated that she was "only going between 35 and 40."

The trial court ruled that it could not admit the bus driver's statements regarding her speed because neither statement fit a hearsay exception. The trial court ruled that the bus testing photographs and video recording were irrelevant, but clarified that

[Meckl] can testify as to the slope, the incline, decline. That information can be put in the form of a hypothetical to Dr. [Ashton-Miller]. Dr. [Ashton-Miller] can make certain assumptions in terms of the mechanism of the injury. And the doctor can assume that the bus was traveling at 30, 35, 40, 45. In those situations, he could explain to the jury could there be an injury under these circumstances.

During Meckl's testimony, the trial court admitted two photographs from Dr. Ashton-Miller's bus testing into evidence. As described by Meckl, the photographs showed a bus traveling at 45 miles an hour. In one photograph, the bus's front wheels were off the ground. In another photograph, the bus's front wheels were off the ground and the bus's rear suspension was sagging.

Dr. Ashton-Miller testified that he had calculated the effects of the forces acting on the bus and Skylar Sokolowski. Dr. Miller also testified that he participated in an experiment on October 24, 2009, during which a school bus similar to Skylar Sokolowski's school bus drove at different speeds through the same intersection, in the same conditions as it was during Skylar's accident. Dr. Ashton-Miller testified that, at speeds from 35 to 45 mile an hour, the bus's front tires left the ground while going through the intersection, its rear end went higher, and the bus bounced when it landed. Dr. Ashton-Miller opined that the forces involved at 40 to 45 miles an

hour would be sufficient to injure Skylar Sokolowski's spine. Dr. Ashton-Miller testified that the forces at 35 miles an hour were "into the gray zone" but "could have" caused a spinal injury

H. THE JURY'S VERDICT

On its verdict form, the jury found that Skylar Sokolowski did not suffer an injury and reached a verdict of no cause of action. The trial court entered judgment in favor of State Farm.

II. EVIDENTIARY RULINGS

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion preserved challenges to the trial court's evidentiary rulings.² The trial court abuses its discretion when its outcome falls outside the range of principled outcomes.³ We review de novo preliminary questions of law surrounding the admission of evidence, such as whether a rule of evidence bars admitting it.⁴

B. THE BUS DRIVER'S SPEED

1. LEGAL STANDARDS

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."⁵ Hearsay is admissible only if it is subject to a hearsay exception.⁶ The party seeking to admit evidence has the burden to establish that it is admissible.⁷

2. APPLYING THE STANDARDS

First, Sokolowski contends that the trial court should have admitted deposition testimony from a separate law suit, in which the bus driver stated that she crossed the intersection at between 35 and 40 miles an hour. We disagree.

Hearsay is admissible if the declarant is unavailable and "(A) the statement offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by the

² *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

³ *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

⁴ *Layher*, 464 Mich at 761.

⁵ MRE 801(c).

⁶ MRE 802; *People v Duncan*, 494 Mich 713, 724; 835 NW2d 399 (2013).

⁷ *Lombardo v Lombardo*, 202 Mich App 151, 154; 507 NW2d 788 (1993).

admission of the statement into evidence,” and the proponent of the statement informs the adverse party in advance of its intent to use the statement.⁸ Hearsay is only admissible under MRE 804(b) “if the declarant is unavailable as a witness.” A declarant is unavailable if he or she is exempt from testifying, refuses to testify, does not remember the subject matter, is unable to presently testify because of death or present illness or infirmity, or is absent from the hearing and the proponent has been unable to procure the witness’s attendance through reasonable means.⁹

Here, Sokolowski failed to show that the bus driver was unavailable under MRE 804(b). The bus driver could not testify at trial because she was not on Sokolowski’s witness list and Sokolowski failed to subpoena her. These reasons do not render the bus driver unavailable under the definition of “unavailable” in MRE 804(a). Therefore, the trial court’s decision to exclude the bus driver’s hearsay testimony under this ground was proper.

Second, Sokolowski contends that the trial court should have admitted, as an excited utterance, Sokolowski’s testimony that the bus driver stated that she was only driving between 35 and 40 miles an hour. We disagree because, again, Sokolowski did not show that the hearsay was admissible.

Hearsay is admissible if it is “[a] statement relating to a starting event or condition made while the declarant was under the stress of excitement caused by the event or condition.”¹⁰ Here, Sokolowski testified that Skylar Sokolowski was screaming and crying when she accused the bus driver of driving too fast. But there is no indication that the *bus driver* was under the stress of excitement. Sokolowski simply failed to lay a foundation for admissibility. We conclude that the trial court’s decision to exclude Sokolowski’s proposed testimony was not outside the range of principled outcomes.

C. DR. ASHTON-MILLER’S TESTIMONY

1. LEGAL STANDARDS

The trial court may only admit relevant evidence.¹¹ Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable.¹² MRE 104(b) provides that the trial court may admit conditionally relevant evidence:

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

⁸ MRE 804(b)(7).

⁹ MRE 804(a).

¹⁰ MRE 803(2).

¹¹ MRE 402.

¹² MRE 401.

2. APPLYING THE STANDARDS

Sokolowski contends that the trial court applied an improper standard to the admission of Dr. Ashton-Miller's testimony. According to Sokolowski, the trial court determined that it could only admit Dr. Ashton-Miller's testimony as demonstrative evidence if the circumstances of his tests were "identical" to the circumstances of Skylar Sokolowski's injuries. We conclude that the record does not support Sokolowski's contention.

Here, State Farm challenged Dr. Ashton-Miller's bus testing evidence. The trial court ruled that it would permit Dr. Ashton-Miller to testify about bus testing *as demonstrative evidence*, and ruled that it would permit Sokolowski "to lay the foundation regarding speed at the time of trial." Sokolowski subsequently failed to provide proofs regarding the bus's speed. State Farm again challenged the evidence, and the trial court ruled that it was irrelevant.

We conclude that the trial court's decision to exclude the evidence as irrelevant did not fall outside the range of principled outcomes. Here, Dr. Ashton-Miller's demonstrative evidence would only make the fact of Skylar Sokolowski's injury more probable if the bus was traveling 35 or more miles an hour. In other words, the relevance of the evidence depended on the fulfillment of a condition of fact: whether the bus was traveling 35 or more miles an hour. Sokolowski did not provide evidence sufficient to support a finding that the bus was traveling 35 or more miles an hour. Therefore, the trial court properly excluded the evidence as irrelevant.

Further, "[a]ny error resulting from the exclusion of cumulative evidence is harmless."¹³ Here, the trial court allowed Dr. Ashton-Miller to testify in the form of a hypothetical. Dr. Ashton-Miller's testimony incorporated his bus testing and his opinion about the mechanisms of Skylar Sokolowski's injury. Thus, even if the trial court erred by excluding the bus testing evidence, any error was harmless because Sokolowski presented the evidence in another fashion.

III. MOTION FOR NEW TRIAL

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's ultimate decision on a motion for a new trial, and reviews de novo questions of law surrounding that decision.¹⁴ The trial court abuses its discretion if its outcome falls outside the principled range of outcomes.¹⁵ When reviewing a motion for a new trial on the basis that the verdict was contrary to the great weight of the evidence, this Court reviews "the whole body of proofs."¹⁶

¹³ *Baidee v Brighton Area Sch*, 265 Mich App 343, 357; 695 NW2d 521 (2005).

¹⁴ *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008)

¹⁵ *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

¹⁶ *Dawe v Dr Reuven Bar-Levav & Assoc, PC (On Remand)*, 289 Mich App 380, 401; 808 NW2d 240 (2010).

B. LEGAL STANDARDS

MCR 2.611(A)(1)(e) allows a trial court to grant a new trial if “[a] verdict or decision against the great weight of the evidence” materially affected a litigant’s substantial rights. The jury’s verdict is against the great weight of the evidence if it is “manifestly against the clear weight of the evidence.”¹⁷ Courts will not set aside a jury’s verdict “if there is competent evidence to support it.”¹⁸

C. APPLYING THE STANDARDS

Sokolowski contends that the jury’s verdict was against the great weight of the evidence because (1) only non-treating doctors testified that Skylar Sokolowski did not suffer a fracture, and (2) Skylar Sokolowski may have suffered a soft-tissue injury or microfracture. We conclude that competent evidence supported the jury’s finding that Skylar Sokolowski was not injured on August 30, 2005.

At the trial, the parties disputed whether Skylar Sokolowski was injured on August 30, 2005. In summary, Sokolowski contended that a fracture in Skylar Sokolowski’s spine caused degradation that caused her kyphoscoliosis. State Farm contended that Skylar Sokolowski was not injured on August 30, 2005, but rather that her uneven muscular structure following her stroke caused her kyphoscoliosis.

Dr. Mendelow testified that he believed that Skylar Sokolowski was injured on August 30, 2005, and that the injury weakened the muscles supporting her spine. Dr. Lewandowski testified that she believed that Skylar Sokolowski was injured in the bus incident in August 2005. Dr. Lewandowski opined that Skylar Sokolowski’s condition predating the bus incident was inconsistent with her current back pain.

Dr. Ashton-Miller, a mechanical engineer specializing in biomechanics, testified that injuries to cartilage and other soft tissues do not usually appear on x-rays, and that compression fractures of “the spongy bones on the inside of the vertebrae” are also difficult to detect on an x-ray. Dr. Lewandowski also opined that Skylar Sokolowski’s muscles or nerves could have been injured, and such an injury would not appear in her x-rays.

Dr. Allen Elster, a radiologist who diagnoses spinal deformities and injuries, testified that he reviewed Skylar Sokolowski’s August 31, 2005 x-ray and subsequent imaging studies and reports. Dr. Elster testified that Skylar Sokolowski’s x-rays “demonstrate only T12 wedging within the range of normal variation,” but that he believed that Skylar Sokolowski suffered a back injury on the basis of her reports of localized pain.

¹⁷ *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (quotation marks and citation omitted).

¹⁸ *Id.*

In contrast, Dr. Chinarian testified that he did not believe that Skylar Sokolowski suffered any type of back injury on August 30, 2005. Dr. Reynolds, who ultimately performed surgery to correct Skylar Sokolowski's kyphoscoliosis, testified that there was no indication that Skylar Sokolowski was injured on August 30, 2005.

Dr. Karol Zakalic, a neurosurgeon, testified that he reviewed Skylar Sokolowski's medical files and concluded that she did not suffer a T-12 compression fracture on August 30, 2005. Dr. Zakalic testified that Skylar Sokolowski's x-rays and imaging studies all depicted only normal variations in her T-12 vertebra. Dr. Zakalic stressed that medical notes for the eight months after August 2005 did not mention that Skylar Sokolowski had back pain or tenderness. Dr. Zakalic opined that Skylar Sokolowski's stroke had weakened her trunk muscles on one side, causing her to develop spine curvature.

Dr. Christopher Kazmierczak testified that Skylar Sokolowski's T-12 vertebra showed normal wedging and he did not see evidence of any traumatic injury to Skylar Sokolowski's spine. Dr. Kazmierczak testified that Skylar Sokolowski's January 2005 and August 2005 x-rays were identical, showing that she had not suffered a compression fracture. Dr. Kazmierczak opined that Skylar Sokolowski's kyphosis was "a more diffuse process than a focal injury would cause."

Dr. Kazmierczak testified that Skylar Sokolowski's scoliosis studies and bone scan showed no signs of fracture, healing bones, or traumatic injury. Dr. Kazmierczak also testified that Skylar Sokolowski's March 2007 MRI showed no evidence of injury to the ligaments in her spine or the soft tissues in her vertebrae, and that any injuries to these areas would have shown on the March 2007 MRI because the spinal cord did not repair itself.

"[I]f there is conflicting evidence, the question of credibility ordinarily should be left for the fact-finder."¹⁹ We will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses.²⁰ Here, there was extensive testimony supporting both parties' arguments. The testimonies of Dr. Chinarian, Dr. Reynolds, Dr. Zakalic, and Dr. Kazmierczak supported the jury's determination that Skylar Sokolowski was not injured on August 20, 2005. We conclude that the trial court's decision to deny Sokolowski's motion for a new trial was within the principled range of outcomes.

D. PROPRIETY OF CLOSING ARGUMENTS

Sokolowski also contends that State Farm's counsel improperly stated during closing argument that Sokolowski was attempting to mislead the jury and that those statements contributed to the verdict. Reversal is warranted if an attorney engages in deliberate improper statements that are intended to prejudice the jury or deflect its attention from the issues.²¹

¹⁹ *Dawe*, 289 Mich App at 401.

²⁰ *Allard v State Farm Ins Co*, 271 Mich App 394, 408; 722 NW2d 268 (2006).

²¹ *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996).

However, a party waives the right to appellate review when the party's own conduct directly causes or contributes to the error.²²

Here, our review of the record indicates that the allegedly improper comments of State Farm's were a direct response to similar comments by Sokolowski's counsel. Because State Farm's comments directly responded to Sokolowski's comments, Sokolowski has caused or contributed to any error. Therefore, Sokolowski has waived review of this issue.

IV. JURY INSTRUCTIONS

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

Generally, this Court reviews de novo claims of instructional error, and reviews for an abuse of discretion whether a specific jury instruction applies in a particular case.²³ However, a party must challenge a jury instruction below in order to preserve the issue for appeal.²⁴ Here, Sokolowski did not challenge either of the trial court's special jury instructions. Thus, Sokolowski's claim is unpreserved.

"This Court will review an unpreserved issue concerning an error in jury instruction only when necessary to prevent manifest injustice."²⁵ "Manifest injustice occurs where the defect in instruction is of such magnitude as to constitute plain error, requiring a new trial, or where it pertains to a basic and controlling issue of the case."²⁶

B. LEGAL STANDARDS

This Court reviews jury instructions to determine whether, on a whole, the instructions included the elements of the plaintiff's claim and did not omit material issues, defenses, or theories.²⁷ "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and applicable law are fairly presented to the jury."²⁸ This Court will not view instructions "piecemeal[.]"²⁹

²² *Farm Credit Servs of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998).

²³ *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Alfieri v Bertorelli*, 295 Mich App 189, 197; 813 NW2d 772 (2012).

²⁴ *Phinney v Perlmutter*, 222 Mich App 513, 556; 564 NW2d 532 (1997).

²⁵ *Id.* at 557.

²⁶ *Id.*

²⁷ *Case*, 463 Mich at 6.

²⁸ *Id.*

²⁹ *Id.*

C. APPLYING THE STANDARDS

Sokolowski contends that the trial court erred when it instructed the jury regarding the bus testing testimony and O'Neill's testimony because the trial court's instructions asked the jury to determine questions of law, not questions of fact. We conclude that the trial court's instructions did not constitute a manifest injustice.

Here, at the close of proofs, the trial court issued two special jury instructions. On instruction allowed the jury to disregard Dr. Ashton-Miller's bus testing testimony if it concluded that the conditions of the testing were not substantially similar to the conditions on August 30, 2005. The second allowed the jury to disregard the testimony of Kevin O'Neill if it found that he offered opinions identifying or diagnosing underlying medical problems, contrary to a statute regulating physical therapists.

On a whole, the trial court's instructions to the jury fairly presented the law, issues, and the parties' theories of the case. Even if we determined that these instructions were improper—which we do not—the issues that the challenged instructions addressed were not central to the parties' theories of the case and concerned relatively minor issues. Thus, any error created by these instructions was not of such a magnitude that it would constitute a manifest injustice. We decline to review this unpreserved issue because our review is not necessary to prevent a manifest injustice.

V. CONCLUSION

We conclude that the trial court did not abuse its discretion when it excluded as hearsay the bus driver's statement regarding the bus's speed or when it restricted Dr. Ashton-Miller's testimony. We conclude that the jury's verdict was not against the great weight of the evidence. Finally, we decline to review Sokolowski's unpreserved issue regarding the trial court's special jury instructions.

We affirm.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly